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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

GEORGE P. DAKMAK,
TRUSTEE FOR BOSTICK FOUNDRY COMPANY,
Petitioner,

v.

LINDBERG,
A DIVISION OF SOLA BASIC INDUSTRIES, INC.,
Respondent,

v.

VENETTA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED

I.

WHETHER 28 U.S.C. § 2075 AND PROCEDURAL DUE PROCESS DEMAND THAT A UNITED STATES DISTRICT COURT OBSERVE THE SUPREME COURT'S BANKRUPTCY RULES REQUIRING NOTICE TO CREDITORS, A HEARING, AND JUDICIAL APPROVAL OF AGREEMENTS IN SETTLEMENT OF A DEBTOR IN POSSESSION'S CAUSES OF ACTION BEFORE THE DISTRICT COURT DISMISSES A DEBTOR IN POSSESSION'S ACTION THROUGH ENFORCEMENT OF A SETTLEMENT AGREEMENT.

II.

WHETHER A UNITED STATES DISTRICT COURT'S JURISDICTION OF A DEBTOR IN POSSESSION'S ACTION PERMITS THE DISTRICT COURT TO ENFORCE A SETTLEMENT IN THE FACE OF A BANKRUPTCY COURT ORDER DISAPPROVING THE SETTLEMENT.

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v.

VENETTA, INC.[2]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 797 F.2d 280 (6th Cir. 1986).

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[1] In February 1979, Bostick Foundry Company ("Bostick") commenced this action on its own behalf. On December 18, 1980 Bostick filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code and continued this action as debtor in possession. On November 16, 1985, while Bostick's appeal to the court of appeals was pending, the Chapter 11 case was converted to Chapter 7 and George P. Dakmak was appointed trustee. Mr. Dakmak seeks a writ of certiorari on behalf of the Chapter 7 bankruptcy estate.

[2] Venetta, Inc. was not a party to the proceeding in the court of appeals.

JURISDICTION

On July 25, 1986, the court of appeals filed its opinion (App. A, *infra*, A-1–A-12) and judgment (App. B, *infra*, A-13). On September 9, 1986, the court of appeals entered its order denying petition for rehearing and rehearing en banc (App. C, *infra*, A-14). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of 28 U.S.C. § 2075, Bankruptcy Rules 2002(a)(3), 6009 and 9019(a), 11 U.S.C. § 362(a), 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a) and (d) are set forth in Appendix E, *infra*, A-20.

STATEMENT

1. On February 9, 1979, Bostick Foundry Company ("Bostick") commenced this negligence and breach of warranty action against respondent Lindberg, a Division of Sola Basic Industries, Inc. ("Lindberg") in the United States District Court for the Eastern District of Michigan, Northern Division, Bay City Unit ("District Court, Bay City Unit") (App. A, *infra*, A-1). The District Court, Bay City Unit exercised 28 U.S.C. § 1332 diversity jurisdiction and, for purposes of this petition, is the court of first instance (*id.* at A-2).

2. On December 18, 1980, Bostick filed a petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division in Detroit ("Bankruptcy Court") (*id.*). Bostick's action in the District Court, Bay City Unit became an asset of the bankruptcy estate upon the

Chapter 11 filing and Bostick thereafter continued the prosecution of that suit as debtor in possession. Charles White ("White") continued to serve as Bostick's local counsel in the action after the filing of the Chapter 11 petition.

3. On August 26, 1981, the Bankruptcy Court entered an order confirming the sale of certain Bostick assets (*id.*). Excluded from the sale was, *inter alia*, Bostick's action against Lindberg (*id.*).[3]

4. On March 15, 1982, Bostick and Lindberg appeared for trial in the District Court, Bay City Unit. Instead of proceeding to trial, however, the parties reached a settlement which was read into the record that day (*id.* at A-3).

5. The settlement was not brought to the attention of the Bankruptcy Court until September 30, 1982 when two Bostick creditors filed an application in that court seeking rejection of the settlement on grounds that it was not in their best interest as Bostick creditors (*id.*).[4] On November 12, 1982, for reasons unclear to the court of appeals, the Bankruptcy Court entered an order rejecting the settlement (*id.* at A-4). Lindberg considered the rejection order interlocutory and moved for leave to appeal the rejection to the United States District Court, Southern Division, Detroit Unit ("District Court, Detroit Unit") (*id.*).

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[3] According to the court of appeals, this order also had the effect of contemporaneously lifting the automatic stay which, according to the court of appeals, "had attached to the District Court litigation pursuant to 11 U.S.C. § 362 as a result of the voluntary petition in bankruptcy filed by Bostick" (*id.*, footnote omitted).

[4] After the settlement was reached, White acknowledged the need for bankruptcy settlement approval but for some reason delayed in seeking it.

6. On December 3, 1982, while Lindberg's motion for leave to appeal the November 12, 1982 rejection was pending, the Bankruptcy Court entered an order substituting Timothy Wittlinger ("Wittlinger") for White as Bostick's special counsel in the District Court, Bay City Unit action against Lindberg (*id.*). This order authorized Bostick's retention of White *nunc pro tunc* to the date of Bostick's Chapter 11 petition.[5]

7. On December 7, 1982, while Lindberg's motion for leave to appeal the November 12, 1982 rejection was still pending before the District Court, Detroit Unit, Lindberg filed in the Bankruptcy Court its own application seeking approval of the settlement. After learning of this application, Wittlinger notified Lindberg on December 10, 1982 that Bostick would not honor the settlement (*id.* at A-5).

8. On December 23, 1982 the District Court, Detroit Unit dismissed Lindberg's motion for leave to appeal the Bankruptcy Court's November 12, 1982 order rejecting the settlement (*id.* at A-4). The court did not consider whether the settlement was in the best interests of the estate (*id.*).

9. On February 7, 1983, the Bankruptcy Court entered an order denying Lindberg's own December 7, 1982 application for approval of the settlement (*id.* at A-5). The court concluded that Wittlinger, as Bostick's special counsel, had authority to withdraw the settlement and that his withdrawal had relieved the court of the responsibility to determine whether the settlement was in the best interest of creditors (*id.*).

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[5] According to the court of appeals, the Bankruptcy Court, by appointing White *nunc pro tunc*, "ratified the action taken by White" after the filing of Bostick's Chapter 11 petition (*id.*).

10. On February 16, 1983, Bostick filed a Motion for Relief From Partial Summary Judgment with the District Court, Bay City Unit seeking amendment of a partial summary judgment entered by that court while White was representing Bostick. The motion was taken under advisement and its merits have never been decided.

11. On January 6, 1984, Lindberg filed in the District Court, Bay City Unit, a Motion to Enforce Settlement and Dismiss Plaintiff's Complaint with Prejudice (*id.*).

12. On June 27, 1985, the District Court, Bay City Unit entered its Memorandum Opinion and Order granting Lindberg's motion, enforcing the settlement and dismissing the action with prejudice (App. D, *infra*, A-15–A-19).[6] In so ruling, the District Court, Bay City Unit rejected Bostick's argument that the lack of Bankruptcy Court approval rendered the settlement unenforceable under Bankruptcy Rule 919(a) (replaced by Bankruptcy Rule 9019(a)). In its written opinion, the court concluded that it did "not believe that Bankruptcy Rule 919(a) should be applied to this matter to prevent the agreement which was knowingly and validly entered into before this Court properly exercising jurisdiction" (*id.* at A-18). In reaching its conclusion, the court relied on the nonbankruptcy principle that settlements are binding without regard to their merits. Bankruptcy Rule 919(a) was held not to alter this rule because, according to the court, the Bankruptcy Rules "govern the procedure in Bankruptcy Court and do not eliminate the jurisdiction of a district court in a related case" (*id.*). In the court's view, the settlement was binding "even though approval by the Bankruptcy Court may be required"

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[6] This order also denied as moot Bostick's Motion for Relief from Partial Summary Judgment (*id.* at A-19). The merits of this motion are crucial to the question whether the settlement is in the best interests of Bostick's creditors.

(*id.* at A-18). "Such approval", the court stated, "is a separate matter" (*id.*). The court did not conduct a hearing on approval of the settlement, did not notify creditors of the motion for enforcement of the settlement and did not find that the settlement was in the best interest of creditors.

13. Before the court of appeals, Bostick asserted that the District Court, Bay City Unit's enforcement of the settlement was improper in light of the intervening bankruptcy (App. A, *infra*, at A-6).[7] In particular, Bostick asserted that the intervening bankruptcy gave rise to the additional requirement of a settlement approval proceeding within the bankruptcy case pending before the Bankruptcy Court in Detroit. Bostick asserted that such a proceeding is completely separate from the proceeding on the merits before the District Court, Bay City Unit as reflected in the separate jurisdictional requirements for each proceeding, the separate parties interested in each, the separate legal principles controlling each and the separate rules of procedure governing each. Bostick also asserted that the Bankruptcy Court's November 12, 1982 and February 7, 1983 orders disapproving the settlement rendered the settlement unenforceable by the District Court, Bay City Unit. In rejecting Bostick's argument and affirming the District Court, Bay City Unit's order enforcing the settlement and dismissing the action, the court of appeals (Judge Wellford dissenting) "recognized the broad, inherent authority and equitable power of a district court to enforce an agreement in settlement of litigation pending before it . . ." (*id.*). With respect to Bostick's intervening bankruptcy, the court of appeals

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[7] The court of appeals suggested in its opinion (*id.*), that Bostick also argued that the dismissal was erroneous because Wittlinger properly repudiated the settlement. Petitioner Dakmak is unable to identify any document or other indication that Bostick took this position before the court of appeals.

considered the Bankruptcy Rules inapplicable insofar as "[T]hose Rules govern the procedure to be followed in the bankruptcy court and do not negate the jurisdiction of a district court properly entertaining a related case under appropriate circumstances" (*id.* at A-7). The court of appeals noted that the District Court, Bay City Unit's jurisdiction of the underlying action was invoked as a result of diversity of citizenship pursuant to 28 U.S.C. § 1332 and concluded that "[T]he district court was not divested of that jurisdiction by the intervening petition in bankruptcy filed in the bankruptcy court" (*id.* at A-8). Referring to its construction of the Bankruptcy Court's August 26, 1981 sale authorization order, the court of appeals held that "Once the bankruptcy court dissolved the automatic stay of proceedings imposed upon the district court by 11 U.S.C. § 362, the district court was free to proceed with all phases of the litigation properly before it, including a disposition by trial or settlement" (*id.*). According to the court of appeals, "In sum, the district court possessed continuing jurisdiction that supported its enforcement of the settlement of the case properly pending before it" (*id.*).

14. In dissent, Judge Wellford concluded that the controversy should be remanded "for a hearing on whether the settlement is in the best interests of Bostick's creditors" (*id.* at A-12). Judge Wellford noted that Bostick's creditors are real parties in interest in any settlement of Bostick's claim against Lindberg (*id.* at A-8), and that Lindberg itself acknowledged the propriety of a settlement approval proceeding by, among other things, appealing the Bankruptcy Court's failure to approve the settlement to the District Court, Detroit Unit (*id.* at A-9).[8]

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[8] Judge Wellford omitted specific reference to Lindberg's own December 7, 1982 Bankruptcy Court motion for approval of the settlement.

15. In its petition for rehearing, petitioner Bostick asserted that the court of appeals' opinion and judgment had abolished the notice, hearing and judicial settlement approval requirements of federal bankruptcy law with respect to actions prosecuted by debtors in possession and bankruptcy trustees in district courts. On September 9, 1986, the court of appeals denied Bostick's petition (App. C, *infra*, at A-14).

REASONS FOR GRANTING THE PETITION

The court of appeals has so far sanctioned a district court's departure from the accepted and usual course of bankruptcy proceedings as to call for the exercise of the Supreme Court's supervisory power. By denying Bostick's creditors their rights to notice, hearing and judicial approval of the Bostick-Lindberg settlement, the courts below have departed from Bankruptcy Rules promulgated by the Supreme Court for the protection of creditors. Unless these protections are restored, creditors will be unable to prevent a debtor in possession from unilaterally diminishing a bankruptcy estate through inadequate settlements. By ignoring the Bankruptcy Court's settlement rejection orders, the courts below have departed from key bankruptcy statutes defining the roles of bankruptcy and nonbankruptcy courts in the administration of Title 11 cases. Unless these departures are reversed, the supremacy of federal bankruptcy law in nonbankruptcy courts will be in doubt.

I.

THE SETTLEMENT APPROVAL REQUIREMENTS OF THE SUPREME COURT'S BANKRUPTCY RULES SERVE BASIC BANKRUPTCY AND DUE PROCESS PURPOSES IN TITLE 11 CASES AND THOSE RULES MUST THEREFORE BE OBSERVED BY BANKRUPTCY AND NONBANKRUPTCY COURTS ALIKE.

Congress empowered the Supreme Court to prescribe rules governing practice and procedure in Title 11 *cases* by enacting 28 U.S.C. § 2075:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

The court of appeals erroneously concluded that nonbankruptcy courts may properly disregard the Bankruptcy Rules because those rules govern only bankruptcy court procedure. This conclusion contradicts 28 U.S.C. § 2075 insofar as that statute envisions rules applicable not to particular *courts* but to all Title 11 *cases*. The filing of a bankruptcy petition commences a Title 11 case and creates an estate. *See,* 11 U.S.C. § 541. The estate includes the debtor's causes of action which must be administered by the debtor in possession or trustee in a manner consistent with Title 11, and therefore in a manner consistent with the Bankruptcy Rules.

A trustee or debtor in possession such as Bostick may utilize *any* state or federal court to liquidate a cause of action belonging to the bankruptcy estate. Under Bankruptcy Rule 6009:

> [A] trustee or debtor-in-possession may prosecute . . . any pending action . . . by . . . the debtor, or commence and prosecute any action . . . in behalf of the estate before any tribunal.

In the event that the trustee reaches a settlement in a Rule 6009 action, the settlement must be noticed to creditors for a hearing on approval which may or may not be granted. Under Bankruptcy Rule 9019(a):

> On motion by the trustee and after a hearing on notice to creditors . . . as provided in Rule 2002(a) . . . , the court may approve a compromise or settlement.

As parties interested in settlement approval proceedings, creditors are entitled to notice of the hearing under Bankruptcy Rule 2002(a)(3):

> [T]he clerk . . . shall give the debtor, the trustee, all creditors and indenture trustees not less than twenty days notice by mail of . . . (3) the hearing on approval of a compromise or settlement of a controversy . . . .

Approval of the settlement must be reasoned judicial approval. *Protective Committee for the Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1, 9 (1968). The court must compare the settlement amount and the recovery likely to be obtained through continued litigation. *Id.* The paramount factor is the interest of creditors. *Drexel* v. *Loomis*, 35 F.2d 800, 806 (8th Cir. 1929); *In re Marshall*, 33 B.R. 42 (Bankr. Ct. D. Conn. 1983) (applying *Drexel* in a Bankruptcy Code case). The nonbankruptcy rule that courts will not inquire into the merits of a settlement thus has no application to the settlement of a trustee's action brought on behalf of creditors.

Absent compliance with bankruptcy settlement approval requirements, a settlement is unenforceable. The cases requiring settlement notice, hearing and approval are legion. *See, e.g., In re Bramham*, 38 B.R. 459, 465 (Bankr. Ct. D. Nev. 1984) ("Absent compliance with

these requirements of notice, hearing and court approval, a purported settlement or compromise is unenforceable."); *Sheppard* v. *Erman*, 24 B.R. 560, 563 (E.D. Mich. 1982) (district court hearing class action against debtor "recognizes that the Bankruptcy Judge has a responsibility under Bankruptcy Rule 919 to approve the settlement on behalf of defendants."); *In re Zerodec Mega Corp.*, 46 B.R. 304, 308 (Bankr. Ct. E.D. Pa. 1985) (accord and satisfaction cannot be applied to settle a disputed or unliquidated claim after the filing of a petition under the Code unless the court approves such a settlement after notice and a hearing); *In re Aweco, Inc.*, 725 F.2d 293 (5th Cir. 1984) (bankruptcy court derives authority to approve settlements from Bankruptcy Rule 919(a) which requires notice and hearing); *In re Lawrence Paperboard Corp.*, 52 B.R. 907, 909 (Bankr. Ct. D. Mass. 1985) ("Bankruptcy Rule 9019 gives the court power to approve the compromise of a dispute after notice and a hearing."); *In re Bell & Beckwith*, 50 B.R. 422, 431 (Bankr. Ct. N.D. Ohio 1985) ("[C]ompromises made by a trustee are subject to the provisions of Bankruptcy Rule 9019(a).").

As Judge Wellford's dissent makes clear, the District Court, Bay City Unit dismissed Bostick's action pursuant to a settlement which was never approved in an independent settlement approval proceeding affording creditors notice and an opportunity to be heard. The court of appeals' affirmance of the dismissal leaves creditors in future Title 11 cases unprotected from potentially inadequate settlements of actions pending in federal district courts when bankruptcy petitions are filed.

The court of appeals' rationale carries wider and more ominous implications than its holding because its rationale calls for the same result with respect to actions continued or brought by debtors in possession or trus-

tees in *any* nonbankruptcy court, state or federal. Independent settlement approval is unnecessary, the court of appeals held, because "[T]he district court possessed continuing jurisdiction that supported its enforcement of the settlement of the case properly pending before it" (App. A, *infra*, A-8). Under this jurisdictional rationale, which the court of appeals did not confine to the facts of this case, any nonbankruptcy court properly exercising jurisdiction over a trustee's action may now enforce a settlement fixing and disposing of the claim without the independent settlement approval proceeding contemplated by the Bankruptcy Rules. As a result of the court of appeals' ruling, creditors have no right to examine or object to settlements of actions which a trustee properly brings or continues in state or federal nonbankruptcy courts. The ruling is a dangerous precedent for the outrageous proposition that trustees and debtors in possession are free to compromise a cause of action and thereby dispose of a bankruptcy estate asset without the knowledge of real parties in interest and without the supervision of the bankruptcy judge.

The District Court, Bay City Unit and the court of appeals both concluded that Bankruptcy Rules apply "in the bankruptcy court and do not negate the jurisdiction of a district court" (*id.* at A-7). The courts below were apparently concerned that compliance with settlement approval procedures would somehow strip away the district court's jurisdiction of the underlying action. This concern ignores the limited nature of a settlement approval proceeding. Such proceedings are separate and independent from the underlying action, which remains pending where it was commenced until the settlement is approved or disapproved. Thus, settlement approval proceedings do not threaten the jurisdiction of the court conducting the underlying proceeding.

In fact, settlement approval is essential to the constitutionality of any order dismissing the underlying proceeding pursuant to a settlement agreement. Creditors have a property interest in a debtor's cause of action; payment of their claims may depend on the extent of the trustee's recovery on behalf of the bankruptcy estate. The purpose of settlement approval proceedings is to protect this interest from a settlement limiting the amount that would otherwise be realized from the debtor's cause of action. Disposition of a debtor's cause of action through settlement is thus subject to due process constraints. *In re Bramham, supra* at 465. These constraints are reflected in the notice and hearing requirements of the Bankruptcy Rules. Any order which purports to enforce a settlement without affording creditors notice and a hearing pursuant to the those rules is potentially unconstitutional for lack of procedural due process.

II.

A NONBANKRUPTCY COURT'S JURISDICTION OF A DEBTOR IN POSSESSION'S ACTION DOES NOT JUSTIFY THE NONBANKRUPTCY COURT'S ENFORCEMENT OF A SETTLEMENT AGREEMENT IN THE FACE OF A BANKRUPTCY COURT ORDER DISAPPROVING THE SETTLEMENT.

The District Court, Bay City Unit enforced the Bostick-Lindberg settlement in the face of the Bankruptcy Court's November 12, 1982 and February 7, 1983 orders disapproving the settlement and in the face of the District Court, Detroit Unit's dismissal of Lindberg's appeal of the November 12, 1982 disapproval. The District Court, Bay City Unit erroneously concluded that its jurisdiction of the underlying action was sufficient to support settlement enforcement despite these orders

entered in Bostick's Chapter 11 case in Detroit. The court of appeals endorsed this view and then added its own erroneous conclusion that enforcement of the settlement was proper under automatic stay principles. These conclusions misapprehend both bankruptcy jurisdiction and the automatic stay. To the extent that it proceeds on these misapprehensions, the court of appeals' opinion threatens the integrity of bankruptcy court orders and undermines the coordination of bankruptcy and non-bankruptcy courts in the administration of Title 11 cases.

With respect to the automatic stay, the court of appeals' opinion rests heavily, if not exclusively, on a misapprehension of the scope and application of 11 U.S.C. § 362. According to the court of appeals, "Once the bankruptcy court dissolved the automatic stay of proceedings imposed upon the district court by 11 U.S.C. § 362, the district court was free to proceed with all phases of the litigation properly before it, including a disposition by trial or settlement" (App. A, *infra*, A-8).

This justification for ignoring settlement approval requirements incorrectly assumes that the automatic stay had in fact been "imposed upon" Bostick's action against Lindberg before being "dissolved". However, the automatic stay never applied to Bostick's action on the merits because the automatic stay does not apply to an action *by a debtor-in-possession or trustee* against a non-debtor such as Lindberg.

Each subparagraph of 11 U.S.C. § 362(a) stays a different potential act *against a debtor or bankruptcy estate*. No subparagraph purports to stay the trustee who, under Bankruptcy Rule 6009, is free to pursue the debtor's claims in any court. The notion that the automatic stay impedes a trustee is without precedent and did not

appear in this dispute until the court of appeals filed its opinion.[9]

One unavoidable implication of the court of appeals' ruling is that the automatic stay is an obstacle to be overcome by nonbankruptcy courts before they can act on a trustee's claim. In erecting this artificial barrier to bankruptcy administration, the court of appeals prevents the full coordination between bankruptcy and nonbankruptcy courts that efficient bankruptcy administration demands.

Even if the court of appeals were correct in assuming that the automatic stay applies to a trustee's action against a non-debtor, its conclusion that the lifting of the stay eliminates settlement approval requirements would still be incorrect. Where an action against a debtor is stayed by a bankruptcy petition and the stay is subsequently lifted, the action may proceed but any settlement affecting the bankruptcy estate must still be approved in a Bankruptcy Rule 9019 hearing. *Sheppard* v. *Erman, supra.*

In basing its decision on a misreading of the scope and application of the automatic stay, the court of appeals failed to address the basic differences between a

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[9] Despite the court of appeals' footnote to the contrary (*id.* at A-2), Bostick never conceded that the automatic stay attached to its action against Lindberg before being dissolved. It "conceded" only that the automatic stay did not apply to the action. Bostick could not have conceded that the Bankruptcy Court's August 26, 1981 sale authorization order "dissolved" any stay as that order is silent with respect to the automatic stay. Moreover, despite the court of appeals' assertion that the District Court, Bay City Unit found that the Bankruptcy Court had "lifted" the automatic stay (*id.* at A-6), the District Court, Bay City Unit's opinion states only that "The case was not removed to the Bankruptcy Court, nor was a stay imposed" (App. D, *infra*, A-18). The notion that the automatic stay of 11 U.S.C. § 362 attached to Bostick's action against Lindberg before being lifted or dissolved by the Bankruptcy Court appeared for the first time in the court of appeals' opinion.

settlement approval proceeding and the action sought to be settled. The differences are not only procedural and substantive, as discussed above, but also jurisdictional.

With respect to jurisdiction, the court of appeals treated settlement approval and the underlying action as a single judicial event requiring but one source of jurisdiction. The court of appeals correctly noted that the District Court, Bay City Unit's jurisdiction was invoked as a result of the parties' diverse citizenship. The court also correctly noted that the trial court's diversity jurisdiction continued after the filing of Bostick's Chapter 11 petition. The court of appeals erred however, in holding that this "continuing" jurisdiction of the action on the merits "supported its enforcement of the [unapproved] settlement of the case properly pending before it" (App. A, *infra*, A-8).

For purposes of jurisdiction, a settlement approval proceeding is a proceeding arising in a Title 11 case. Under the amendments to Title 28 brought by the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, authority to conduct proceedings "arising in" Title 11 cases is automatically referred by district courts to bankruptcy judges unless and until the reference is withdrawn by the district court. *See*, 28 U.S.C. §§ 1334(b), 157(a) and (d).

The automatic reference to the bankruptcy judge of the settlement approval controversy here was not withdrawn by the District Court, Bay City Unit. Such withdrawal would have provided that court with bankruptcy authority to conduct a settlement approval hearing on notice to Bostick's creditors. In his dissent, Judge Wellford properly concluded that the interests of creditors can be protected through a settlement approval proceeding in either a bankruptcy court *or* a district court.

Except for its flawed "continuing jurisdiction" and automatic stay rationales, the court of appeals offered no justification for permitting enforcement of the settlement in the face of bankruptcy court settlement disapproval orders. Even if those orders did not exist, the District Court, Bay City Unit should have withdrawn the bankruptcy judge's authority to approve any settlement and conducted its own approval proceeding in compliance with the statutes and rules established by Congress and the Supreme Court. The usefulness of state and non-bankruptcy federal courts in the administration of bankruptcy cases depends on recognition by those courts that federal bankruptcy laws are "the supreme law of the land which all courts — state and federal — must observe." *Kalb* v. *Feuerstein*, 308 U.S. 433, 439, 60 S.Ct. 343, 346, 84 L.Ed. 370, 375 (1940).

CONCLUSION

The court of appeals has sanctioned a departure from accepted and usual bankruptcy proceedings by affirming a district court's enforcement of an agreement settling a bankruptcy estate's cause of action without the notice to creditors, the hearing or the judicial settlement approval required by the Bankruptcy Rules. The court of appeals has also sanctioned a departure from accepted practice by affirming a district court's enforcement of a settlement in the face of bankruptcy court orders disapproving the settlement. Under these circumstances,

this petition should be granted to permit exercise of the Supreme Court's supervisory power.

Respectfully submitted,

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Dated: December 3, 1986

APPENDICES

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APPENDIX A

OPINION

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed July 25, 1986)

(BOSTICK FOUNDRY COMPANY, Plaintiff-Appellant, v. LINDBERG, A DIVISION OF SOLA BASIC INDUSTRIES, INC., Defendant and Third-Party Plaintiff-Appellee, v. VENETTA, INC., Third-Party Defendant — ON APPEAL from the United States District Court for the Eastern District of Michigan; No. 85-1637)

Before: KRUPANSKY and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

KRUPANSKY, Circuit Judge, delivered the opinion of the court in which PECK, Senior Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 9-12*) delivered a separate dissenting opinion.

KRUPANSKY, Circuit Judge.

The plaintiff Bostick Foundry Co. (the plaintiff or Bostick), a Chapter 11 debtor, appealed the order of the district court dismissing its suit against the defendant-appellant Lindberg, Inc. (the defendant or Lindberg), a division of Sola Basic Industries, Inc.

The procedural history of the instant case is somewhat involved. Bostick initiated an action in February of 1979 in the United States District Court for the Eastern District of

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* [*Original pagination; see pp. A-8 – A-12.*]

Michigan against the defendant Lindberg, styled *Bostick Foundry Co.* v. *Lindberg, Div. of Sola Basic Industries*, No. 79-40044 (E.D. Mich. 1979) (later denominated Civil Action No. 79-10297), predicated upon diversity jurisdiction wherein it alleged negligence and breach of warranty incident to the sale by the defendant to the plaintiff of an industrial coreless induction furnace. The defendant counterclaimed and joined a supplier, Venetta, Inc., as a third-party defendant. In December of 1980, the plaintiff Bostick filed a voluntary petition in bankruptcy under Chapter 11 in the Eastern District of Michigan.

The docket sheet in the district court disclosed that on February 4, 1981, Judge James Harvey conducted a pretrial conference in the Bostick-Lindberg district court action during which proceeding he reviewed the status of the discovery proceedings which had continued after the filing of the bankruptcy petition and also scheduled a trial date of September 14, 1981. The district court litigation was never removed to the bankruptcy court nor was such removal sought. On August 26, 1981, the bankruptcy court confirmed the sale of certain Bostick assets but excluded therefrom, *inter alia*, Bostick's district court lawsuit against Lindberg. The bankruptcy court contemporaneously lifted the automatic stay of proceedings that had attached to the district court litigation pursuant to 11 U.S.C. § 362 [1] as a result of the voluntary petition in bankruptcy filed by Bostick.

On September 17, 1981, Judge Harvey referred the district court litigation to Magistrate Harvey Walker subse-

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[1] It is conceded by the parties herein that the district court thereafter possessed continuing jurisdiction to proceed with the disposition of the action commenced in February of 1979 and that any stay of proceedings pursuant to 11 U.S.C. § 362 of the Bankruptcy Code was dissolved by the August 26, 1981 bankruptcy court order.

quent to designating him as a special master. Judge Harvey thereafter rescheduled trial for March 15, 1982. During the months immediately preceding the rescheduled trial date, the parties continued to pursue exhaustive discovery in preparation for trial. On March 9, 1982, shortly before trial, the defendant's motion for partial summary judgment on certain claims involving implied warranties and incidental and consequential damages was granted by Judge Harvey on the recommendation of Magistrate Walker.

On March 15, 1982, the parties appeared in the district court to commence trial. The plaintiff Bostick was represented by its counsel of record Charles White (White), who appeared with William Shapiro, an officer and principal shareholder and creditor of Bostick. Instead of proceeding with the trial, the parties negotiated and concluded a settlement that resolved the claims of all parties in interest, which settlement agreement was placed upon the record of the court. Under the terms of the settlement, the defendant Lindberg was to pay the plaintiff Bostick the sum of $40,000 and the claims and cross-claims of the parties were to be dismissed with prejudice. The parties were to memorialize the settlement by filing with the district court within 30 days an executed settlement incorporating the terms and conditions of their agreement as reflected by the court record. Although an executed agreement was not filed within the 30-day period mandated by the court, the defendant Lindberg forwarded two checks totalling $40,000 to the plaintiff Bostick in accordance with the terms of the settlement.

On September 30, 1982, approximately six months after the settlement between the parties, two of Bostick's creditors filed an application in the bankruptcy court seeking to set aside the settlement, charging that it was

not in the best interests of the estate. On November 12, 1982, Bankruptcy Judge Ray Graves conducted a hearing ostensibly to determine if the settlement concluded on March 15, 1982 between Bostick and Lindberg in Case No. 79-40044/10297 before the district court was in the best interests of the estate. On that same date, Bankruptcy Judge Graves issued an order wherein he rejected, out of hand, the district court's March 15, 1982, settlement without stating any reasons therefor.[2] On December 23, 1982, then District Judge Ralph Guy, upon reviewing Lindberg's motion for leave to appeal the November 12, 1982 bankruptcy court order to the district court filed pursuant to 28 U.S.C. § 1334, concluded that the bankruptcy court order was not a final appealable order and declined to certify it to the district court as an interlocutory appeal. He dismissed Lindberg's appeal without considering whether the settlement was in the best interests of the estate. No appeal was taken from Judge Guy's order of dismissal.

On December 3, 1982, while Lindberg's motion for leave to appeal was pending before District Judge Guy, the bankruptcy court at the request of Bostick replaced attorney White as Bostick's legal counsel and appointed Timothy Wittlinger (Wittlinger) as counsel of record to pursue the district court Bostick-Lindberg civil litigation in Case No. 79-40044/10297. In the same order, the bankruptcy court ratified the action taken by White between

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[2] From this court's review of the transcript of that hearing, it is apparent that, apart from colloquy between legal counsel for the parties and the court, no dispositive action by the court is reflected. It is also apparent in the record that the bankruptcy judge never considered or decided if the district court settlement was in the best interests of the estate. It could be inferred from the record that the bankruptcy court rejected the district court's settlement because of insufficient notice to Bostick's creditors as to its terms and conditions, although, as previously observed, the bankruptcy court's reasons for its action were not affirmatively stated in the record.

December 18, 1980 (the date that Bostick filed Chapter 11 proceedings) and November 29, 1982 by appointing him as special counsel to represent Bostick and its bankrupt estate in the district court litigation with Lindberg. White's appointment as special counsel was *nunc pro tunc* to December 18, 1980. On December 7, 1982, Lindberg, in an effort to expedite the proceeding before the district court, filed an application with the bankruptcy court seeking approval of the March 15, 1982 district court settlement. On December 10, 1982, Wittlinger, as Bostick's counsel of record, notified Lindberg by letter that Bostick would not honor the district court settlement of the Bostick-Lindberg civil litigation. On February 7, 1983, Bankruptcy Judge Graves, subsequent to a hearing, issued an order denying all pending motions seeking approval of the March 15, 1982 district court settlement, concluding that Wittlinger, Bostick's current legal counsel, had authority to repudiate the settlement and having properly exercised that authority in repudiating the agreement, the bankruptcy court was relieved from the responsibility of deciding if the March 15, 1982 district court settlement was in the best interests of the bankrupt estate because the issue was moot.

On January 6, 1984, Lindberg filed a motion in the district court before Judge Harvey, styled a "Motion to Enforce the Settlement and Dismiss Plaintiff's Complaint with Prejudice," seeking enforcement of the March 15, 1982 settlement and dismissal of the plaintiff's action. Bostick opposed the motion. On June 27, 1985, Judge Harvey granted the defendant Lindberg's motion and accordingly dismissed the plaintiff's action on the merits and ordered that the settlement be enforced. Judge Harvey in an opinion supporting his disposition of the action concluded that the district court possessed continuing jurisdiction over the case, that the district court proceedings had not been removed to the bankruptcy

court, that the bankruptcy court had lifted the stay of the district court proceeding that had automatically attached to the action by operation of law pursuant to 11 U.S.C. § 362, that the settlement has been duly concluded by Bostick's counsel of record on March 15, 1982, and that the Bankruptcy Rules which governed practices and procedures in bankruptcy court did not affect the jurisdiction of a district court in a related case or its authority to dismiss the plaintiff's complaint pursuant to a settlement concluded by the parties.

On appeal to this court, the plaintiff Bostick has charged that the district court's dismissal was erroneous because Wittlinger, Bostick's replacement legal counsel, properly repudiated the settlement and that the district court's enforcement of the March 15, 1982 settlement was improper in light of the intervening bankruptcy actions.

This circuit has long recognized the broad, inherent authority and equitable power of a district court to enforce an agreement in settlement of litigation pending before it, even where that agreement has not been reduced to writing. *Bowater North America Corp.* v. *Murray Machinery, Inc.*, 773 F.2d 71, 76-77 (6th Cir. 1985); *Odomes* v. *Nucare, Inc.*, 653 F.2d 246, 252 (6th Cir. 1981); *United States* v. *Scholnick*, 606 F.2d 160, 166 (6th Cir. 1979); *Aro Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976); *Kukla* v. *National Distillers Products Co.*, 483 F.2d 619, 621 (6th Cir. 1973); *All States Investors, Inc.* v. *Bankers Bond Co.*, 343 F.2d 618, 624 (6th Cir.), *cert. denied*, 382 U.S. 830, 86 S.Ct. 69, 15 L.Ed.2d 74 (1965). Once concluded, a settlement agreement is as binding, conclusive, and final as if it had been incorporated into a judgment and the actual merits of the antecedent claims

will not thereafter be examined. *Clinton Street Greater Bethlehem Church* v. *City of Detroit*, 484 F.2d 185, 189 (6th Cir. 1973).

At the outset, this court rejects the plaintiff's argument that Bostick's legal counsel Wittlinger could effectively repudiate the March 15, 1982 settlement which was duly concluded by the parties on that date. The plaintiff was represented by legal counsel and an officer of Bostick, both of whom assented to the agreement, the terms and conditions of which were incorporated in the district court record. *Cf. In re Tidewater Group, Inc.*, 8 Bankr. 930 (Bankr. N.D. Ga. 1981).

In considering the district court's authority to enforce the settlement in light of the pending voluntary bankruptcy proceeding commenced subsequent to the filing of the suit in the district court, this court's attention is initially directed to the appropriate sections of the Bankruptcy Code impacting upon the matter. The plaintiff has argued on appeal that Bankruptcy Rule 9019(a), formerly 919(a), divested the district court of jurisdiction to enforce the settlement absent bankruptcy court approval thereof.[3] Pursuant to that Rule, the bankruptcy court may approve a compromise submitted to it by the trustee. *See generally* 4 Collier on Bankruptcy ¶ 704.01 at 704-5 (15th ed. 1985).

This court is in agreement with the district court below that those Rules govern the procedure to be followed in the bankruptcy court and do not negate the jurisdiction of a district court properly entertaining a related case under appropriate circumstances. The jurisdiction of the district court in the case at bar was invoked as a result of a diversity of citizenship of the

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[3] Bankruptcy Rule 9019 superseded Rule 919 effective August 1, 1983. The two rules are essentially identical.

parties pursuant to 28 U.S.C. § 1332. The district court was not divested of that jurisdiction by the intervening petition in bankruptcy filed in the bankruptcy court. Once the bankruptcy court dissolved the automatic stay of proceedings imposed upon the district court by 11 U.S.C. § 362, the district court was free to proceed with all phases of the litigation properly before it, including a disposition by trial or settlement. In sum, the district court possessed continuing jurisdiction that supported its enforcement of the settlement of the case properly pending before it. *Cf. Aro Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976); *In re Neese*, 12 Bankr. 968, 970 (Bankr. W.D. Va. 1981).

Accordingly, the district court's decision granting the defendant Lindberg's motion to enforce the settlement concluded on March 15, 1982 and to dismiss the plaintiff's complaint with prejudice is AFFFIRMED.

WELLFORD, Circuit Judge, dissenting.

This case has a number of troubling aspects, not the least of which was the lack of opportunity of the creditors of plaintiff Bostick to express their views on the appropriateness of the settlement negotiated in District Judge Harvey's court. Certainly among the real parties at interest in Bostick's claim against defendant Lindberg, after the filing of the Chapter 11 bankruptcy petition, were the creditors of Bostick. All the parties and their representatives before the district court were aware of Bostick's bankruptcy at the time of the settlement and of the interest of the bankruptcy trustee as a fiduciary to secure a fair and reasonable settlement, primarily for the benefit of Bostick's creditors. After the proposed settlement was negotiated and before any final action to

enforce it, Lindberg itself, in a responsive pleading to the creditor banks' effort in the bankruptcy court to have the settlement rejected, took the position that "Bostick should be ordered by the Bankruptcy Court to move for consideration of the proposed settlement." J/A at 66 (Lindberg's motion for rehearing and reconsideration filed November 22, 1982). Lindberg clearly was *not* asserting that the bankruptcy court had no jurisdiction to approve the proposed settlement. At that juncture, Lindberg took the position that "notice to creditors of the proposed settlement may be served" and that creditors should be afforded the opportunity for a hearing concerning the settlement in the bankruptcy court in which Bostick's bankruptcy action was pending. J/A at 67.

Furthermore, Lindberg itself appealed from the failure of the bankruptcy court to consider (and to reconsider) the proposed settlement on its merits to then District Judge Guy. Although he ruled in December 1982 that the interlocutory appeal by Lindberg would "not materially advance the ultimate termination of either the bankruptcy proceeding or the related civil action," and thus declined to grant the appeal, Judge Guy observed:

> [A]lthough *the parties knew that any settlement agreement would have to be approved by the bankruptcy court*, neither Bostick nor Lindberg sought such approval.

J/A at 203 (emphasis added). Thus Judge Guy's view, with which all the parties apparently agreed, was that the proposed settlement agreement must have bankruptcy court approval.

Bostick acknowledges that the bankruptcy court lifted the automatic stay to permit Bostick to pursue the "re-

lated civil action against Lindberg" in the district court where it was originally filed, and that this action was never "removed" to the bankruptcy court for trial. Regrettably the bankruptcy court "never considered or decided if the district court settlement was in the best interest of the estate." It seems, however, that Bankruptcy Judge Graves took this nonaction because the creditors had never been notified. *See* J/A at 265-66. Instead, he ruled that Bostick's replacement counsel had the authority to reject the proposed settlement because the creditors did not receive notice, and apparently because at least several major bank creditors strongly urged rejection of the settlement as inadequate.

After having been rebuffed in its repeated efforts to have the bankruptcy court approve the settlement, Lindberg finally sought to have Judge Harvey order Bostick's civil action dismissed pursuant to the terms of the proposed settlement agreement. Previous to that time, Lindberg had taken the position in court that it recognized the settlement, in order to be finally effective, required a stamp of approval from the bankruptcy court. The record amply supports a conclusion that all parties and counsel understood that the proposed settlement announced in Judge Harvey's court, but never filed following that announcement, was subject to ratification by the bankruptcy court. The parties took positive and affirmative steps to carry out that understanding of the settlement. I do not believe that Judge Harvey should have allowed Lindberg to reverse its position that bankruptcy court approval was necessary. Recognizing, as did both Bostick's legal representative and Lindberg, that the interests of creditors were involved and that Bostick's counsel was acting in at least a quasi-fiduciary position, Judge Harvey should have withheld his dismissal of the case until the bankruptcy court con-

sidered the effect of the settlement on the interests of all the creditors, or until he himself determined, under the peculiar circumstances about which he was fully aware, that the settlement was reasonable and that no mistake or unconscionable undertaking had occurred.[1]

While I agree with the panel majority that the district court had jurisdiction to act based on the facts before it, I am convinced from positions taken by the parties in the bankruptcy court, and from all the circumstances, that the proposed settlement agreement included a tacit condition subsequent requiring bankruptcy court approval, or in the absence of bankruptcy court approval a similar determination by the district court itself with an opportunity for creditors of Bostick to be heard. The troubling lack of opportunity for creditors to be heard on the merits of the settlement, when coupled with Lindberg's original position that the proposed settlement

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[1] I do not consider the authority relied upon by Judge Harvey, *In re Tidewater Group*, 8 B.R. 930 (N.D. Ga. 1981), to support his ruling. *Tidewater* cited with approval *Lincoln National Life Insurance Co.* v. *Scales*, 62 F.2d 582 (5th Cir. 1933), to the effect that a debtor in possession's powers to bind the bankruptcy estate, including the rights of creditors, was subject to court approval. Thus, it held:

> [A]n agreement by a debtor in possession to compromise litigation should also be binding upon all parties to the agreement pending a court determination as to whether or not to approve the agreement. See e.g. *Frazier* v. *Ash*, 234 F.2d 320 (5th Cir. 1956). Therefore, Tidewater is competent to enter an agreement which is binding *pending Court approval or disapproval*.

8 B.R. at 933.

Tidewater continued, in explanation:

> Of course, the issue of whether the agreement should be approved as being in the best interest of the creditors remains to be decided at the time when a hearing is held on the application for approval of the agreement. *In re Haas Davis Packing Co.*, 2 BCD 167 (B.C.S.D. Ala. 1975).

8 B.R. at 933.

required approval by the bankruptcy court, persuades me that the district court's dismissal of Bostick's cause of action should be set aside. I would remand to the district court for a hearing on whether the settlement is in the best interests of Bostick's creditors or for remand to the bankruptcy court for that purpose.

APPENDIX B

JUDGMENT

(United States Court of Appeals for the Sixth Circuit)

(Filed July 25, 1986)

(BOSTICK FOUNDRY COMPANY, Plaintiff-Appellant, v. LINDBERG, a Division of Sola Basic Industries, Inc., Defendant/Third-Party Plaintiff-Appellee, v. VENETTA, INC., Third-Party Defendant — No. 85-1637)

Before: KRUPANSKY and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

(Certification Omitted)

BEST AVAILABLE COPY

APPENDIX C

ORDER

(United States Court of Appeals for the Sixth Circuit)

(Filed September 9, 1986)

(BOSTICK FOUNDRY COMPANY, Plaintiff-Appellant, v. LINDBERG, A DIVISION OF SOLA BASIC INDUSTRIES, INC., A CONNECTICUT CORP., Defendant and Third-Party Plaintiff Appellee, v. VENETTA, INC., AN OHIO CORPORATION, Third-Party Defendant-Appellee — No. 85-1637)

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges, and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

APPENDIX D

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(BOSTIC [*sic*] FOUNDRY CO., Plaintiff - vs - LINDBERG, Defendant -vs- VENETTA, INC., Third-Party Defendant — NO. 79-10297)

At a session of said Court held in the Federal Building, Port Huron, Michigan on the 27th day of June, 1985.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This matter is before the Court on the following motions:

(1) Defendant Lindberg's motion to enforce the settlement and dismiss plaintiff's complaint with prejudice;

(2) Plaintiff's motion for relief from partial summary judgment;

(3) Defendant Lindberg's motion to supplement counterclaim.

The Court will address these motions in the order listed above.

I. *Defendant Lindberg's Motion to Enforce the Settlement and Dismiss Plaintiff's Complaint with Prejudice*

Defendant Lindberg seeks dismissal of plaintiff Bostic's complaint with prejudice and enforcement of a settlement

agreement which the parties accepted on the record on March 15, 1982.

Plaintiff Bostic Foundry opposes defendant's motion essentially contending that because the Bankruptcy Court has denied approval of the settlement agreement in issue, there is no binding settlement of this litigation which this Court could enforce; the underlying claim has not been extinguished and therefore the complaint in this action should not be dismissed.

To provide a context for addressing this motion, the Court will briefly set forth the procedural history of this case. Bostic instituted this suit for breach of certain express and implied warranties in February of 1979. In 1980, Bostic filed for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court of the Eastern District of Michigan. The bankruptcy action was assigned to Judge Ray Graves. Litigation of the instant case, nevertheless, proceeded with the approval of the Bankruptcy Court. Attorney Charles White was authorized *nunc pro tunc* by Judge Graves to represent Bostic for the prosecution and litigation of the instant case.

In 1982, partial summary judgment was granted by this Court, eliminating Bostick's implied warranty claims. Thereafter, a settlement agreement was reached in this action in March of 1982. The settlement was accepted on behalf of Bostic by its attorney, Charles White, and its president, William Shapiro. The settlement agreement was placed on the record before Magistrate Harvey D. Walker. Defendant Lindberg subsequently prepared the settlement papers and sent Bostic two checks totaling $40,000.00 on May 7 and June 3, 1982, in accordance with the settlement.

Subsequently, Mr. White indicated Bankruptcy Court approval of the settlement should be obtained. How-

ever, he delayed in filing an application for removal. On December 3, 1982, the Bankruptcy Court appointed new counsel, Timothy Wittlinger, to conduct the Bostic-Lindberg litigation effective November 30, 1982. In the same order the Court approved Mr. White's representation *nunc pro tunc* for the period December 18, 1980 to November 29, 1982.

On December 10, 1982, Bostic's newly appointed counsel wrote to Lindberg to attempt to withdraw "any and all offers of settlement" and "any and all acceptances of any settlement offers previously made by it or its attorneys in this matter." On January 11, 1983, at a hearing in the Bankruptcy Court, Bankruptcy Judge Graves decided that "Mr. Wittlinger has the authority to withdraw the settlement, therefore we need not go any further with any hearing today and the parties may have their remedies against any party or any attorney for whatever they claim flows from this decision." Judge Graves also noted that his decision was based on the assertion that Mr. Wittlinger had the authority to reject the settlement and did so. Defendant Lindberg now seeks enforcement of the settlement agreement and dismissal of the action, while plaintiff Bostic wishes to proceed with the case based upon the asserted withdrawal of settlement and the complaint as filed.

A settlement agreement is as binding, conclusive and final as entry of a judgment. *See Clinton Street Greater Bethlehem Church* v. *City of Detroit*, 484 F.2d 185, 189 (6th Cir. 1973). Once a settlement has been reached a court will not inquire into the merits of the original cause of action. *Id.* Although a settlement agreement may be set aside, such action is warranted only upon a showing of mistake, fraud or unconscionable advantage. *Id.*; *Belrose* v. *Kanitz*, 284 Mich. 497 (1938); *Collins* v. *Searight-Downs Mfg. Co.*, 245 Mich. 41 (1928).

Although Bankruptcy Rule 919(a) provides that the Bankruptcy Court may approve a compromise or settlement, those rules govern the procedure in Bankruptcy Court and do not eliminate the jurisdiction of a district court in a related case. *See In re Neese*, 12 B.R. 968, 970 (Bk. Ct. W.D. Va. 1981). *See also In re Ricks*, 26 B.R. 134 (Bk. Ct. Idaho, 1983); *Aro Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.) *cert. denied* 429 U.S. 862 (1976). Thus, a settlement agreement entered into on the record in a related case in district court is binding upon all parties competent to enter such agreement even though approval by the Bankruptcy Court may be required. *In re Tidewater Group, Inc.*, 8 B.R. 930, 933 (Bk. Ct. N.D. Ga. 1981). Such approval is a separate matter. *Id.*

Having reviewed the applicable law, the parties[']motions and responses in this case, as well as the decisions of Judges Graves and Guy, the Court believes the settlement agreement in this case should be enforced. This Court retained jurisdiction over the matter and Mr. White was the authorized representative of plaintiff Bostic when the agreement was reached. The case was not removed to the Bankruptcy Court, nor was a stay imposed. The Court does not believe Bankruptcy Rule 919(a) should be applied to this matter to prevent the agreement which was knowingly and validly entered into before this Court properly exercising jurisdiction.

Accordingly, for the reasons set forth above, defendant Lindberg's motion to enforce the settlement and dismiss plaintiff's complaint with prejudice is GRANTED.

II. *Plaintiff's Motion for Relief from Partial Summary Judgment*

Based upon the Court's decision to enforce the settlement and dismiss plaintiff's complaint set forth above, the Court does not find it necessary to address this

motion. Accordingly, plaintiff's motion for relief from partial summary judgment is DENIED as moot.

III. *Defendant Lindberg's Motion to Supplement Counterclaim*

Again, based upon the Court's decision to enforce the settlement and dismiss plaintiff's complaint, the Court does not find it necessary to address this motion. Accordingly, defendant Lindberg's motion to supplement counterclaim is DENIED as moot.

IV. *CONCLUSION*

For the reasons set forth above the Court hereby rules as follows:

(1) Defendant Lindberg's motion to enforce the settlement and dismiss plaintiff's complaint with prejudice is GRANTED;

(2) Plaintiff's motion for relief from partial summary judgment is DENIED;

(3) Defendant Lindberg's motion to supplement counterclaim is DENIED.

Plaintiff's complaint is hereby DISMISSED with prejudice. Fees and costs will not be awarded to any party.

IT IS SO ORDERED.

/s/ JAMES HARVEY
UNITED STATES DISTRICT JUDGE

APPENDIX E

RELEVANT FEDERAL STATUTES AND RULES

28 U.S.C. § 2075. Bankruptcy rules.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

Bankruptcy Rule 6009 PROSECUTION AND DEFENSE OF PROCEEDINGS BY TRUSTEE OR DEBTOR IN POSSESSION

With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.

Bankruptcy Rule 9019 COMPROMISE AND ARBITRATION

(a) Compromise. On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

* * *

Bankruptcy Rule 2002 NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, AND UNITED STATES

(a) Twenty-day Notices to Parties in Interest. Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of (1) the meeting of creditors pursuant to § 341 of the Code; (2) a proposed use, sale, or lease of property other than in the ordinary course of business unless the court for cause shown shortens the time or directs another method of giving notice; (3) the hearing on approval of a compromise or settlement of a controversy, unless the court for cause shown directs that notice not be sent; (4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 3002(c)(6); (5) in a chapter 7 liquidation and a chapter 11 reorganization case, the hearing on the dismissal or conversion of a case to another chapter; (6) the time fixed to accept or reject a proposed modification of a plan; (7) hearings on all applications for compensation or reimbursement of expenses totalling in excess of $100; and (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c).

* * *

11 U.S.C. § 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

* * *

28 U.S.C. § 1334. Bankruptcy cases and proceedings

* * *

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

* * *

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

* * *

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

* * *

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-920

In The Supreme Court of the United States

October Term, 1986

GEORGE P. DAKMAK,
Trustee for Bostick Foundry Company,
Petitioner

v.

LINDBERG,
A Division of Sola Basic Industries, Inc.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT LINDBERG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Should this Court grant a petition for a writ of certiorari to review this case in which a district court, having jurisdiction over the action of a debtor in bankruptcy against a defendant, enforced a settlement entered into on the record in that action, where the facts giving rise to the legal controversy are unique to the case and where the district court possessed the appropriate jurisdiction?

PARENT, SUBSIDIARIES AND AFFILIATES OF THE PETITIONER

General Signal Corporation, a New York corporation, is the wholly owned parent of Sola Basic Industries, Inc.

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No. 86-920

In The
Supreme Court of the United States
October Term, 1986

GEORGE P. DAKMAK,
Trustee for Bostick Foundry Company,
Petitioner

v.

LINDBERG,
A Division of Sola Basic Industries, Inc.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT LINDBERG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent Lindberg, a division of Sola Basic Industries, Inc., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Sixth Circuit Court of Appeals' opinion in this case. That opinion is reported at 797 F.2d 280 (1986).

COUNTER-STATEMENT OF THE CASE

In February, 1979, petitioner Bostick Foundry Company, by its attorney Charles W. White, filed a civil complaint in the federal district court for the Eastern District of Michigan, Northern Division, alleging that respondent Lindberg had breached certain warranties and been negligent in the manufacture and repair of a furnace melting system that Lindberg had sold to Bostick in 1978. During the pendency of the litigation, on December 18, 1980, Bostick filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code, in the Eastern District of Michigan, Southern Division. Notice of the automatic stay was sent to Judge Harvey of the Northern Division of the Eastern District, to whom the civil action had been assigned. Bostick's civil action against Lindberg remained dormant for nearly ten months.

On August 26, 1981, the bankruptcy court issued an order authorizing and confirming the sale of certain assets, but specifically excluded Bostick's civil action against Lindberg which was to continue in district court. Shortly afterwards, trial of the case in district court was set for March 15, 1982 by Magistrate Harvey D. Walker, who had been appointed special master. Each side conducted discovery. Throughout this period, Charles White, the attorney who had originally brought suit on Bostick's behalf, continued to represent Bostick.

On February 2, 1982, Bostick, through its bankruptcy counsel, filed an Application For Authority To Employ Attorneys for Special Purposes For Debtor-In-Possession in the bankruptcy court. Bostick requested that Charles White be allowed to continue his representation of Bostick in the prosecution of its civil action against Lindberg. No objection to Mr. White's continued representation was filed by any party.

On February 27, 1982, upon motion by Lindberg, Magistrate Walker issued a Memorandum Opinion and Recommendation, recommending that Lindberg be granted a partial summary judgment on Bostick's warranty and consequential damages claims. Judge Harvey adopted Magistrate Walker's recommendation in full.

Settlement On The Day Of Trial

On the morning of March 15, 1982, all parties appeared before Magistrate Walker for trial of the remaining issues. Bostick was represented at trial by counsel Charles White and by William Shapiro, a principal shareholder of Bostick, one of its officers and directors and a major creditor.

Following a settlement conference with Magistrate Walker, Mr. White, Mr. Shapiro, and Mr. Steiner, the attorney for Lindberg, conducted settlement negotiations over the course of approximately three hours. Ultimately, the parties agreed that the claims should be settled for cash payment from Lindberg to Bostick of $40,000 and Lindberg's agreement to dismiss its counterclaim against Bostock in the amount of $50,545.45 plus interest, costs and attorney fees.

The settlement agreement was placed on the record before Magistrate Walker, in the presence of Mr. Shapiro and with the concurrence of Mr. White, Bostick's attorney. Within a week of the placement of the settlement agreement between Bostick and Lindberg on the record, Mr. White was informed by Mr. Shapiro that two banks that were creditors of Bostick had been notified of the agreement. On March 24, 1982, Mr. White spoke to Mr. David Murphy, the banks' counsel, to explain the terms of Bostick's settlement agreement, and on March 26, 1982 he discussed the settlement agreement with Mr. Robert Sandler, Bostick's bankruptcy counsel. Subsequently, Mr. White met with and spoke to both Mr. Murphy and Mr. Sandler on a number of occasions to discuss the settlement agreement. Meanwhile, on March 25, 1982, because

he had not received the documentation, Magistrate Walker ordered submission of the settlement papers within thirty days.

Efforts To Reject Settlement In Bankruptcy Court And Bostick's Failure To Take Action

A number of months later, after he had received Lindberg's settlement checks and settlement documentation, Bostick's attorney, Mr. White, stated for the first time that he believed he was required to seek bankruptcy court approval of the settlement. For reasons best known to Bostick, neither Mr. White nor Bostick's bankruptcy counsel requested bankruptcy court approval of the settlement.

In the meantime, on September 30, 1982, the two creditor-banks filed an application in bankruptcy court seeking rejection of the settlement and compromise between Bostick and Lindberg. Lindberg filed a reply requesting that the bankruptcy court dismiss the application for rejection.

Following hearing on the banks' application, the bankruptcy court entered an order on November 12, 1982 rejecting the settlement solely because it found that Bostick's creditors had not been properly notified of the settlement in advance. The court did not reach the issue of whether Bostick should be required to notify the creditors properly of its settlement agreement with Lindberg in order to afford the bankruptcy court an opportunity to rule on the question of whether the settlement was in the best interest of the estate.[1]

Lindberg filed an Application for Leave to Appeal the original Order Rejecting The Proposed Compromise in the United States District Court for the Eastern District of Michigan, Southern Division. On December 23, 1982, the district court denied the application for interlocutory appeal, after

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[1] The bankruptcy court also denied Lindberg's motion for reconsideration and rehearing.

observing that interlocutory appeal should be used only in extraordinary cases and not merely to provide review of difficult rulings in hard cases. The court found only that extraordinary circumstances justifying an interlocutory appeal did not exist in this case.

Appointment Of New Counsel For Bostick

In the meantime, on December 3, 1982, the bankruptcy court appointed new counsel, Timothy Wittlinger, to conduct the Bostick-Lindberg litigation in district court effective November 30, 1982. Mr. Wittlinger was no stranger to the case. In fact, as Charles White stated in an affidavit filed in bankruptcy court before the scheduled trial in March, 1982, Bostick's principal shareholder, William Shapiro, had asked Mr. White if he would object to having Mr. Wittlinger join him as co-counsel. A week before the March 15, 1982 trial date, Mr. Wittlinger sought an adjournment of the trial, but his request was denied. Mr. Wittlinger, therefore, declined to appear in the case at that time.

In the same December 3, 1982 order appointing Mr. Wittlinger, the bankruptcy court approved Mr. White's representation of Bostick *nunc pro tunc* for the period December 18, 1980 to November 29, 1982.

Lindberg's Efforts To Have Settlement Approved And Bostick's Withdrawal Of Settlement Offers

On December 7, 1982, Lindberg filed its own Application For Approval Of Settlement And Dismissal Of Lawsuit. Proper notice to the creditors of the hearing on Lindberg's application for approval of the settlement was served on all interested parties pursuant to the bankruptcy rules. On December 23, 1982, Bostick's former attorney Charles White also filed an Application For Order Authorizing Compromise of Litigation.

By letter dated December 10, 1982, however, Bostick's newly appointed counsel, Mr. Wittlinger, wrote to Lindberg to attempt to withdraw "any and all offers of settlement" and "any and all acceptances of any settlement offers previously made by it or its attorneys in this matter." Furthermore, Mr. Wittlinger stated that Bostick "consider[ed] such acceptances, if any, null and void."

On January 11, 1983, at the hearing on the applications filed by Lindberg and Mr. White to have the settlement approved, the bankruptcy court decided that if, as was asserted, Bostick's newly appointed counsel had the authority to revoke the settlement agreement which had been entered into by Bostick's former counsel and made a matter of record in the district court, the court would allow such revocation. The bankruptcy court therefore refused to consider the question of whether the settlement was in the best interest of the estate.

Lindberg's Motion To Enforce The Settlement In District Court

Lindberg, therefore, was left in limbo, with a valid settlement agreement it believed enforceable in the district court, which Bostick's newly appointed counsel claimed it could revoke unilaterally. The bankruptcy court refused to approve or disapprove the settlement because Bostick claimed to have revoked its acceptance and refused to request approval. The bankruptcy court did, however, find that "the parties may have their remedies against any party. . . for whatever they claim flows from this decision."

Lindberg therefore moved in the district court before which the settlement had been placed on the record to enforce the settlement and dismiss Bostick's complaint. In a Memorandum Opinion And Order dated June 27, 1985, the district

court granted Lindberg's motion. In its Memorandum Opinion And Order, the court stated:

> Although Bankruptcy Rule 919(a) provides that the Bankruptcy Court may approve a compromise or settlement, those rules govern the procedure in Bankruptcy Court and do not eliminate the jurisdiction of a district court in a related case.
>
> * * *
>
> [T]he Court believes the settlement agreement in this case should be enforced. This Court retained jurisdiction over the matter and Mr. White was the authorized representative of plaintiff Bostic [sic] when the agreement was reached. The case was not removed to the Bankruptcy Court, nor was a stay imposed. The Court does not believe Bankruptcy Rule 919(a) should be applied to this matter to prevent the agreement which was knowingly and validly entered into before this Court properly exercising jurisdiction.

Judgment "that the plaintiff take nothing and that this action be dismissed on the merits" was entered on June 27, 1985. Bostick appealed from entry of this judgment to the Sixth Circuit Court of Appeals.

The Sixth Circuit affirmed the district court's decision granting Lindberg's motion to affirm the settlement concluded on March 15, 1982 and to dismiss Bostick's complaint with prejudice. The court of appeals, recognizing the broad, inherent authority and equitable power of a district court to enforce an agreement in settlement of litigation before it, held that the district court possessed continuing jurisdiction that supported its enforcement of the settlement of the case properly pending before it.

REASONS THE PETITION SHOULD BE DENIED

1. The Court Should Not Review This Matter Because The Facts Giving Rise To The Legal Controversy Are Unique To This Case And Unlikely To Recur.

Sup. Ct. R. 17 sets forth the character of reasons this Court may consider in deciding whether to grant a petition for certiorari. None of those reasons is applicable in this case. The Sixth Circuit has not "rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Petitioner cites no case from any court which, on similar facts, has held as petitioner argues the Sixth Circuit should have held. Indeed, there is no other reported case with the unique facts of this case. Nor has the Sixth Circuit "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Finally, in its decision, the Sixth Circuit has not "decided an important question of federal law which has not been, but should be, settled by this Court."

Neither a great deal of money nor an important legal principle is at issue in this case. The parties settled the case for $40,000. The facts are unique to this case: they will rarely, if ever, occur again. Very few other persons or parties, if any, will be affected by the case because the facts are *sui generis*. Although the issue may be important to Bostick, it is not of interest and importance to the public and, accordingly, is not worthy of consideration by this Court. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

As the Sixth Circuit stated, "[t]he procedural history of the instant case is somewhat involved." 797 F.2d at 280. So involved is it, in fact, that it will undoubtedly never be repeated. In this case, although Bostick claimed that it believed the settlement had to be approved by the bankruptcy court, it took absolutely no steps — timely or otherwise — to secure such approval. Indeed, the first time the bankruptcy court considered any aspect of the settlement was upon an application filed by two of Bostick's creditors asking the court to reject the settlement and not because of any action taken by Bostick. In rejecting the settlement, the bankruptcy court never considered whether it was in the best interest of the estate but made its decision on the procedural basis that the creditors had not been properly notified of the settlement in advance. Even then, although professing to agree with the decision of the bankruptcy court, Bostick took no steps to see that the creditors were properly notified, as the bankruptcy court apparently believed they should have been.

In December, 1982, *at Bostick's request*, the bankruptcy court not only approved the employment of new counsel, Timothy Wittlinger, to represent Bostick in the district court matter, but it also — at Bostick's own request — approved the employment of Charles White *nunc pro tunc* for the period December 18, 1980 to November 29, 1982. Bostick *itself* asked that Mr. White's previous actions, which included entering into the settlement agreement, be approved, and the bankruptcy court agreed to so approve them.

On December 10, 1982, however, Mr. Wittlinger withdrew from the settlement Bostick had knowingly entered into (as if he had the power to do so) and did not seek bankruptcy court approval of the settlement. Even when, on January 11, 1983, there was an opportunity for the bankruptcy court to consider the merits of the settlement (if such consideration was even necessary, as Bostick asserted and continues to assert), Bostick would not assent to or allow that consideration.

Rather, it claimed the authority to revoke the settlement into which it had entered on the record in the district court and the bankruptcy court erroneously allowed it to do so.

These complicated and unique facts generated the legal controversy in this case. They are unlikely to recur in the same way so as to give rise to the same legal controversy in any other case. Rare will the occasion be when (a) a debtor enters into a settlement on the record in a district court proceeding then, (b) months later, after sitting on its hands for the entire time, asserts that the settlement must be approved by the bankruptcy court, (c) takes no steps whatsoever to have that court consider the merits of the settlement, (d) secures bankruptcy court approval *nunc pro tunc* of the actions of the attorney who represented it in the district court at the time the settlement was entered into, and then, (e) after new counsel is appointed, withdraws from the settlement.

Not only does the unique factual setting militate against grant of the petition, but the gross misconduct of the petitioner, as delineated by the facts set forth, compels denial of the petition. Bostick seeks "to eat its cake and have it too": first, by placing the settlement on the record in federal district court and then, although claiming that bankruptcy court approval was necessary, failing and refusing to present it to that court, and, second, when it appeared that the bankruptcy court might consider the matter, by withdrawing its settlement, giving the bankruptcy court nothing to decide. Bostick now claims bankruptcy court approval is necessary when Bostick itself was the party which prevented the bankruptcy court's consideration of the matter. This Court should not impart approval to such outrageous gamesmanship by granting the petition for certiorari.

2. The Sixth Circuit Court of Appeals Properly Held That The District Court Had The Power And Jurisdiction To Enforce The Settlement Entered Into On The Record Before It.

It is well established that district courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them. *Kukla v. National Distillers Products Co.*, 483 F. 2d 619 (6th Cir. 1973). After such a settlement is reached, a court will not inquire into the merits of the original cause of action. *Clinton Street Greater Bethlehem Church v. City of Detroit*, 484 F. 2d 185 (6th Cir. 1973). Settlements knowingly made in open court should not be upset because of any subjective hesitation or secret reservation on the part of either party.

Here, with both parties at the court and prepared for trial, a settlement was reached on the day of trial and made a matter of record. No mention was made of any reservation of authority. Lindberg prepared the necessary paperwork and tendered to Bostick the amount of the settlement. The court ordered submission of the documentation. Almost a year later Bostick hired new counsel and attempted to withdraw its acceptance of the settlement. Allowance of that withdrawal would have been patently unfair to the court and Lindberg.

Bostick claims that the district court did not have the authority to enforce the settlement. This position misapprehends the power and jurisdiction of the district court and ignores the very background of this case. There can be no claim that the attorney who originally accepted the settlement in the district court on behalf of Bostick did not have his client's authority to settle the case. Bostick itself, in the person of an officer and director, was in attendance. The only argument which the petitioner had made to justify its attempt to back out of its agreement is its after-the-fact theory that the settlement required bankruptcy court approval and therefore could not

become binding on the parties until such approval was obtained. The district court properly rejected Bostick's theory and enforced the settlement notwithstanding the petitioner's refusal to seek bankruptcy court approval. District court jurisdiction over this case and the settlement agreement is not inconsistent with Bankruptcy Rule 919(a), the procedural rule then in effect which permitted a bankruptcy court to approve a compromise or settlement. This case might have been stayed or removed to the bankruptcy court. It was not, however. Rather, at the election of the parties and with the full knowledge and approval of the bankruptcy court, the case was ordered to proceed in the district court. There was no reservation of jurisdiction or authority in the bankruptcy court. The jurisdiction of the *entire* case, including pretrial motions, trial *and settlement*, properly lay in the district court.

Although the bankruptcy court might have claimed concurrent jurisdiction or reserved to itself the ultimate power to approve or disapprove settlements, it did not do so. Except for appointing counsel to conduct the litigation in district court, the bankruptcy court not only abstained from exercising any jurisdiction but entrusted that jurisdiction to the district court. *See, e.g., In re Ricks*, 26 B.R. 134 (Bk. Ct. Idaho, 1983). District court jurisdiction was not ousted by Bankruptcy Rule 919(a). That rule, by definition, can only apply in cases over which the bankruptcy court retains or obtains jurisdiction. Bankruptcy Rule 11-1, which sets forth the scope of the Bankruptcy Court Rules in Chapter 11 cases, including 919(a), states: "The rules and forms in this Title V govern the procedure *in courts of bankruptcy* . . ." (emphasis added). The rules themselves did not pretend to extend to govern or grant jurisdiction over district court diversity cases. Compare, for instance, *In re Tidewater Group, Inc.*, 8 B.R. 930 (Bk. Ct. N.D. Ga., 1981) (settlement reached in bankruptcy court case; bankruptcy rule 919(a) applies) with *In re Neese*, 12 B.R. 968, 970 (Bk. Ct. W.D. Va. 1981) (settlement reached in related

district court case; district court has jurisdiction to enforce the settlement). Thus, the district court alone, without bankruptcy court approval, had the power and jurisdiction to decide that the settlement agreement should be enforced and dismiss the plaintiff's underlying claim.[2] Bankruptcy court acquiesence was unnecessary.

3. Pursuant To Fed. R. Civ. P. 41(b) And To Its Inherent Power, The District Court Properly Dismissed Bostick's Complaint

Fed. R. Civ. P. 41(b), as well as the inherent power of the district court to handle proceedings before it, also provides an additional reason to deny the petition for certiorari. Faced with Bostick's failure to act for over eight months after the matter was settled on the record and then with its purported withdrawal from the settlement, the district court properly confirmed the settlement and dismissed Bostick's complaint.

Fed. R. Civ. P. 41(b) states in part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

The Court of Appeals for the Seventh Circuit, in an appeal with facts similar to the facts in this case, affirmed a district court in dismissing a suit after the settlement agreement had been accepted. *Lyles v. Commercial Lovelace Motor Freight, Inc.*, 684 F.2d 501 (7th Cir. 1982). Likewise, the Sixth Circuit, in an appeal with facts not totally dissimilar to the facts in this case, affirmed the decision of a district court in dismissing a suit after settlement had been accepted (and the court had ordered the plaintiff to accept tender or suffer dismissal) relying

[2] Even the dissent in the Sixth Circuit agreed that the district court had jurisdiction to act based on the facts before it. See 797 F.2d at 285.

on the inherent power of the court to deal with abuse. *Reid v. Prentice-Hall, Inc.*, 261 F.2d 700 (6th Cir. 1958); *Refior v. Lansing Drop Forge Co.*, 124 F.2d 40 (6th Cir. 1942), *cert. denied*, 316 U.S. 671 (1942).

In this case, Bostick and Lindberg did reach a settlement which was placed on the record in the district court. Both the court and Lindberg were led to believe for a number of months that the matter had been settled. *If* the matter had to be submitted to the bankruptcy court for approval, this was Bostick's obligation. It failed and refused to do so. When it appeared that the bankruptcy court would consider the issue on the merits, it withdrew the settlement leaving the bankruptcy court powerless.

Regardless of the bankruptcy court approval issue, the district court had the power both under Fed. R. Civ. P. 41(b) and the inherent power reflected in *Reid*, *supra*, to dismiss the case.

CONCLUSION

Respondent Lindberg respectfully requests that the Court deny Bostick's Petition For A Writ Of Certiorari.

Respectfully submitted,

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